BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELLA J. GARDNER	)	
Claimant	)	
v.	)	Docket No. 1,064,307
	)	
CERTAINTEED CORPORATION	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the May 24, 2013 preliminary hearing Order. Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for self-insured respondent (respondent).

The preliminary hearing Order indicates claimant sustained injury by repetitive trauma that arose out of and in the course of her employment, with a November 7, 2012 date of injury by repetitive trauma. Benefits were denied based on untimely notice.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the May 22, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant requests the preliminary hearing Order be reversed. Claimant argues that she provided timely notice and respondent had actual knowledge of her injury, such that the notice provisions of K.S.A. 2012 Supp. 44-520 are waived. The date of injury by repetitive trauma is not an issue. Respondent maintains that the preliminary hearing Order should be affirmed.

The only issue is: did claimant prove timely notice or did respondent have actual knowledge of her injury?

FINDINGS OF FACT

Claimant has worked for respondent for 26 years, and for the last 10-15 years as a team leader. She testified at length regarding repetitive use of her hands at work.[1]

[1] P.H. Trans. at 8-26.

Around November 2011, claimant began experiencing pain in her hands, as well as numbness and tingling in her fingers. Her symptoms would increase after working all week. She testified that she went on her own to see Dr. Kloiber, the company doctor, who told her she probably had arthritis.

Claimant returned to Dr. Kloiber on March 26, 2012, and complained of left hand and arm symptoms. Claimant told him that an unnamed doctor injected the base of her thumb and said she had arthritis and carpal tunnel syndrome. Dr. Kloiber diagnosed basilar joint arthritis. He doubted claimant had an occupational injury and told her to see her own doctor under health insurance. Dr. Kloiber advised claimant to complete an injury report if she had an injury. According to claimant, she returned to Dr. Kloiber in September 2012 and was again told her condition was not work related and to see her own doctor.

Claimant testified she saw Mark Humphrey, M.D., an orthopedic surgeon, on November 7, 2012, and he diagnosed her with work-related carpal tunnel syndrome. Claimant did not relay Dr. Humphrey's diagnosis to her foreman, John Monroe:

> Q. All right. So in this particular case, after you saw Humphrey and he told you this was work related, did you go report this to your foreman?
>
> A. I had already -- John already knew that my hand was hurting me because I was wearing a brace on my hand every day to work.
>
> Q. This was John . . .
>
> A. John Monroe. I'm quite sure Chris [Close] saw me with a brace on my hand every day at work.
>
> . . .
>
> Q. All right. These guys knew you had a problem with your hand is what you–
>
> A. Yes.
>
> Q. Because they saw you had a brace on your hand?
>
> A. Yes.
>
> . . .
>
> Q. Did you ever go to John or Chris and tell them that the reason you had the brace on your hand was because you had injured your hand while working at CertainTeed?
>
> A. No.

> Q. After you saw Dr. Humphrey, when – if at any time – did you go tell your foreman that you thought that your problem with your hand or wrist was due to your work at CertainTeed?
>
> A. No.[2]

On November 9, 2012, two days after claimant's evaluation with Dr. Humphrey, she returned to Dr. Kloiber and advised him of Dr. Humphrey's work-related diagnosis. Claimant asked Dr. Kloiber to send her out for medical treatment, but he recommended she seek medical care for non-occupational issues through her primary care physician.

Claimant testified that between November 9, 2012 and February 2013, she advised the plant manager, whose name she could not recall, that Dr. Kloiber told her that old people and black people get carpal tunnel syndrome. Claimant testified that she should have filed an EEOC complaint. Claimant did not know when this discussion occurred, but guessed it happened within a week of her November 9, 2012 meeting with Dr. Kloiber.

According to claimant, the plant manager asked her if she told Mr. Monroe that she hurt her hand. Claimant told the plant manager that she had not hurt her hand, but rather her hand just started hurting.[3] She testified that the plant manager wanted to know if she had filed an incident report. Claimant testified that she told the plant manager that she had not told Mr. Monroe that she hurt her wrist.[4] She further testified that while the plant manager did not tell her to file an incident report, he advised her to speak to Mr. Monroe.[5]

Claimant testified that she spoke to Mr. Monroe "a couple months [after seeing Dr. Humphrey] or something like that, because I had talked to the plant manager."[6] The content of this discussion is not clear from the record, but it appears Mr. Monroe told claimant he would speak to Mark Mackey, Director of Environmental Health and Safety. Claimant testified she continued to work, but when time passed by with no response from anyone, she followed up with Mr. Monroe, who confirmed he spoke with Mr. Mackey and that Mr. Mackey would be coming to speak with her.

Mr. Mackey often saw claimant wearing a brace at work. He confirmed a February 2013 conversation with Mr. Monroe about claimant saying her wrists hurt. Mr. Mackey testified that he asked Mr. Monroe if claimant said her condition was work related and that Mr. Monroe responded that claimant said nothing about her work being involved.

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[2] *Id.* at 40-42.

[3] *Id.* at 50.

[4] *Id.* at 59.

[5] *Id.* at 60.

[6] *Id.* at 49-50.

In February 2013, claimant returned to Dr. Kloiber accompanied by Mr. Mackey. Claimant testified that she again asked Dr. Kloiber if he would send her to a doctor and was told that the carpal tunnel was not work related. The following day, claimant received a call from Mr. Mackey indicating she should not come back to work until she had a release from her doctor. Claimant has not returned to work subsequent to February 11, 2013.

According to Mr. Mackey, management's first notice from claimant that she suffered a work-related injury was in February 2013, which led to the preparation of an accident report on February 22, 2013. Mr. Mackey testified that injured workers are to notify their foreman, not the company doctor, about a work accident:

> Q. Basically they would go to their foreman?
>
> A. Correct.
>
> Q. Or to Dr. Kloiber.
>
> A. Their foreman is – is what's posted and what's in the rules and in the code of conduct and what's signed off on by everybody.[7]

Claimant had prior workers compensation claims where she reported accidents and completed incident reports. She knew she was to report work accidents to her foreman.

On April 10, 2013, claimant was seen by Bruce Toby, M.D., at the request of her family physician. Claimant complained of bilateral arm pain and numbness due to her work for respondent. X-rays showed significant CMC arthropathy at the base of the left palm. Dr. Toby believed the EMG studies to be "quite mild" and not clearly showing severe carpal tunnel syndrome. Dr. Toby diagnosed claimant with diffuse upper extremity pain, left basilar thumb arthropathy and mild carpal tunnel syndrome. Dr. Toby believed she should only have a carpal tunnel release if she were going to have the CMC procedure done.

Claimant was seen at her attorney's request by Edward Prostic, M.D., on April 12, 2013. Dr. Prostic diagnosed claimant with bilateral carpal tunnel syndrome and basal joint disease. On April 22, 2013, claimant was seen at respondent's request by Thomas Phillips, M.D., who diagnosed her with severe degenerative arthritis of the CMC joint of the left thumb and moderate degenerative arthritis of the right CMC joint, as well as mild bilateral carpal tunnel syndrome. Both Drs. Prostic and Phillips, while using slightly different terminology, opined claimant's work was the prevailing factor in her current diagnoses.

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[7] *Id.* at 81-82.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

Claimant provided notice of injury by repetitive trauma in February 2013, which was not within 20 days of her November 7, 2012 date of injury by repetitive trauma.

Claimant and the plant manager discussed her hand and/or her wrist, Dr. Kloiber's comments, whether she advised Mr. Monroe about being hurt or if she completed an incident report. When this discussion occurred is unclear. Claimant guessed the discussion occurred about one week after her November 9, 2012 visit to Dr. Kloiber. Claimant testified the plant manager directed her to discuss the matter with Mr. Monroe. However, claimant testified she did not talk to Mr. Monroe for a couple months after her November 7, 2012 examination by Dr. Humphrey, which was two days before the aforementioned visit with Dr. Kloiber. This time line does not add up. If claimant spoke to the plant manager about a week after November 9, 2012, and was thereafter told by the plant manager to speak to Mr. Monroe, it would seem her conversation with Mr. Monroe would have occurred far earlier than approximately two months after her November 7, 2012 visit with Dr. Humphrey. Based on the evidence, this Board Member cannot determine when claimant's discussion with the plant manager occurred.

Perhaps more importantly, it is unclear from the current record whether claimant advised the plant manager that she was asserting a workers compensation claim, requesting workers compensation benefits or suffered a work-related injury, i.e., whether she provided notice, or if she simply had pain. Claimant did not prove that she timely apprised her supervisors or management that she had injury by repetitive trauma.

Claimant gave notice to Dr. Kloiber. However, claimant's complaints to Dr. Kloiber do not suffice as notice to "a supervisor or manager," as required by K.S.A. 2012 Supp. 44-520(a)(2). Dr. Kloiber was not a supervisor or manager. There is also no evidence that Dr. Kloiber was respondent's "duly authorized agent" for the purpose of having notice of injury by repetitive trauma.

Mr. Monroe and Mr. Mackey knew claimant had a brace on her hand or wrist and knew claimant had complaints of hand or wrist pain. Claimant's pain complaints are not the legal equivalent of notice.[8] Claimant's argument regarding actual knowledge is based on the assumption that because Mr. Monroe and Mr. Mackey knew she was hurt and saw her wearing a wrist brace, they must have known she was injured due to her work activities. Knowledge of symptoms is not actual knowledge for the purpose of notice.

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[8] See *Mendoza v. American Warrior, Inc.*, No. 1,018,561, 2005 WL 600055 (Kan. WCAB Feb. 1, 2005); and *Ball v. Overnite Transportation Company*, Nos. 219,441 & 219,442, 1997 WL 377949 (Kan. WCAB June 19,1997).

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes claimant did not provide notice within 20 days of her November 7, 2012 date of injury by repetitive trauma. Respondent did not have actual knowledge of claimant's work injury.

DECISION

WHEREFORE, the undersigned Board Member affirms the preliminary hearing Order.[9]

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Michael R. Wallace
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Frederick J. Greenbaum
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Honorable William G. Belden

[9] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.